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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

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NORTHERN PLAINS RESOURCE COUNCIL; TONGUE RIVER AGRICULTURE PROTECTION ASSOCIATION; ROSEBUD PROTECTIVE ASSOCIATION; and TRI-COUNTY RANCHERS ASSOCIATION,

Petitioners,

-vs-

THE UNITED STATES OF AMERICA; the INTERSTATE COMMERCE COMMISSION; and the TONGUE RIVER RAILROAD COMPANY,

Respondents.

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SUPPLEMENTAL APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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APPENDIX D

INTERSTATE COMMERCE COMMISSION

CERTIFICATE AND DECISION

Finance Docket No. 30186

TONGUE RIVER RAILROAD COMPANY - RAIL CONSTRUCTION AND OPERATION - IN CUSTER, POWDER RIVER AND ROSEBUD COUNTIES, MT

Finance Docket No. 30186 (Sub-No. 1)

TONGUE RIVER RAILROAD COMPANY - ISSUANCE OF SECURITIES

Decided: May 1, 1986

In Finance Docket No. 30186, the Tongue River Railroad Company (TRRC) seeks authority under 49 U.S.C. 10901 to construct and operate an 89-mile rail line from two points south of Ashland, MT to a point near Miles City, MT. The proposed line will serve future coal mines in the Ashland area and will connect with the Burlington Northern Railroad Company (BN) near Miles City. In Finance Docket No. 30186 (Sub-No 1), TRRC also seeks authority under 49 U.S.C. 11301 to issue approximately $175 million in securities to finance the proposed

construction. The applications are opposed by the Northern Plains Resource Council, Tongue River Agriculture Protection Association, Rosebud Protective Association, and Tri-County Ranchers Association (collectively referred to as "NPRC").

In an initial decision served September 4, 1985, the Administrative Law Judge (ALJ) approved both applications, but subjected the construction and operation of the line to conditions intended to mitigate the environmental impacts of the proposed construction. (For the conditions, see Appendix B of the Initial Decision.) The appeals of TRRC and NPRC raise only one issue: the effect that section 2(c) of the Mineral Lands Leasing Act of 1920, 30 U.S.C. 202 (Leasing Act) should have on our consideration of these applications.

BACKGROUND

1. Purpose of the Proposal. TRRC, a limited partnership, was formed in 1981 to provide rail service to future coal mines in the Tongue River Valley of

southeastern Montana. While it is estimated that over 10 billion tons of mineable low-sulfur coal are in reserve in this area, no rail line serves the potential mine sites, the highways are inadequate for truck movements of coal, and other alternatives such as mine-mouth generation and coal slurry pipelines are not considered feasible. The coal reserve holders have been unable to develop their mines because utilities have been reluctant to enter contracts with the holders without the assurance of adequate transportation. BN declined to construct a line because coal reserve holders had not obtained firm coal contracts from utilities.

2. Proposed Route. The proposed route of the 89-mile line will follow the Tongue River Valley between Miles City and two points south of Ashland. The line will connect with BN at Miles City. Two options have been proposed for that connection. One would connect TRRC and BN through rail yards abandoned by the former Chicago, Milwaukee, St. Paul and Pacific Railroad

Company (MILW). The second option (the so-called BN option) would connect TRRC and BN at Branum Lake near the Miles City Fish Hatchery, owned by the Montana Department of Fish, Wildlife and Parks.

From Miles City, the line will proceed south along the west side of the Tongue River, crossing the United States Department of Agriculture Livestock and Range Research Station (LARRS). Ten miles north of Ashland, the line will cross the river and continue south. Near Ashland, the line will split into two branches. One branch will continue south along Otter Creek and terminate 7.7 miles south of Ashland. The other branch will follow one of two alignments in or around Ashland, continue southwest and terminate at the Montco Mine (Montco) 8.9 miles south of Ashland. These two alignments are: (1) the Ashland southeastern alignment, which would route the line along the eastern edge of Ashland and continue between Otter Creek and the Tongue River to Montco; and (2) the Ashland northeastern alignment, which would route

the line through Ashland along the Tongue River and terminate at Montco.

3. Structure of TRRC. As section 2(c) involves, as discussed infra, a company or corporation operating a common carrier railroad while holding a Federal coal lease, the structure and composition of TRRC is critical. Therefore, the facts pertaining to TRRC and its component entities and their affiliates are restated here.[1]

TRRC consists of three general partners: Transportation Properties (TP), and D.S. Cartage (DS), each holding 42.075 percent, and Otter Creek Transportation Company (Otter Creek), holding 14.850 percent, and a limited partner, Tongue River Holdings, Inc. (TRH), holding 1.00 percent. TRH is a nominal entity owned proportionally by the general partners, and was organized as a vehicle to be used in the event any of TRRC's general partners changes its interest to become a

1. See organization chart of TRRC in Appendix A.

limited partner.

TP is a partnership composed of WesRail, Ltd. and ThermRail, Inc. WesRail, Ltd., in turn, is a limited partnership composed of Wesco Transportation, Inc. (Wesco Trans) and Bellford & Company (Bellford). Wesco Trans is a wholly-owned subsidiary of Wesco Resources, Inc. (Wesco). Bellford provides financing for Wesco and holds limited partnerships in its ventures. ThermRail, Inc. is a wholly-owned subsidiary of Washington Energy Company (Washington).

DS is a wholly-owned subsidiary of Diamond Shamrock Coal Company (DS Coal), which is a wholly-owned subsidiary of Diamond Shamrock Corporation (DS Corp). Otter Creek is a wholly-owned subsidiary of Consol Transportation Company (CTC). CTC is itself a wholly-owned subsidiary of Consolidated Coal Sales Company (Consol), whose parent, Conoco, Inc., is owned by E.I. du Pont de Nemours and Company (DuPont).

TRRC will be managed by a committee of three

members, composed of one representative from each general partner. Voting is weighed to reflect the interest of each general partner, with decisions made by a majority of interests. Under the partnership agreement, the committee will have sole responsibility for managing TRRC through all phases of construction and operation. It is proposed that there will be no direct connection with any coal mining operation of any partner's affiliates. The agreement also provides that the management committee may delegate functions to a managing agent.

The proposed construction is in three phases and is currently in Phase I, which involves ordering design and engineering studies, obtaining necessary permits and certificates for construction and operation, negotiating mitigating conditions, and arranging preliminary financing. The management committee has delegated responsibility to carry out Phase I of the project to Wesco Trans.

Phase II involves all functions relating to construction, such as purchasing right-of-way, obtaining

materials and equipment, and securing bids from contractors. Phase III involves obtaining long-term financing, completing construction, purchasing equipment, and commencing operations. At this point, no decisions have been made whether Wesco Trans would be delegated functions in Phases II and III, or whether it would have any management responsibilities for operations of TRRC.

4. Coal Ownership. Each of the general partners in TRRC is affiliated with coal interests.[2]

TP is related to several companies holding coal interests. Wesco and Bellford are partners in Wesbel, Ltd. Washington's subsidiary, Thermal Energy, Inc. (Thermal) and Wesbel, Ltd., are partners in ThermWest which, in turn, is in partnership with Tongue River Resources (TRR) in Cook Mountain Partnership (Cook Mt). TRR is a wholly-owned subsidiary of DS Coal. Cook Mt was organized to develop coal reserves located north of

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2. See chart in Appendix B.

Ashland.

Thermal also obtained Federal coal lease M-54714 in April 1982. The lease is located in the Cook Mountain area, but is not part of Cook Mt. Wesco successfully bid on a Federal coal lease adjoining the Thermal lease. Wesco's lease has not been issued because it has not obtained surface rights. Thermal and Wesco propose to develop their holdings jointly and use TRRC to transport coal.[3]

The Thermal and Wesco leases are also involved in two court suits against the Department of Interior (DOI) challenging all Federal coal leases in Montana. In Northern Cheyenne Tribe v. Hodel, CV. 82-116-BLG (D. Mont. 1982), Federal coal leases are alleged to violate the National Environmental Policy Act (NEPA), the Federal

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3. The section of land covered by a Federal coal lease is considered too small to be efficiently and economically developed as a mine. This is why Thermal proposes to develop its Federal lease in conjunction with Wesco.

Coal Leasing Amendments of 1976, and the Federal trust responsibility to the Northern Cheyenne Tribe. The second suit, National Wildlife Federation v. Burford, CV. 82-117-BLG (D. Mont. 1982), alleges that DOI did not derive fair market value for the leases.

Thermal and DS Coal are also partners in the Montco mine, being developed on private reserves southwest of Ashland. Montco is the only mine site in the Tongue River Valley that Montana has granted a permit to and that can therefore start a mining operation. The mine is presently under construction and expects to use TRRC to transport coal.

Consol holds coal interests in private lands in Otter Creek. It supports TRRC's application because its coal interests can be developed only if a viable rail transportation system exists. It expects that TRRC will give it essential rail service. Consol also holds Federal coal lease No. M-46292 in Big Horn County. TRRC will not serve Consol's Federal leasehold.

TRRC's application is also supported by other coal interests in the Tongue River Valley. Meridian Land and Mineral Company (Meridian), a subsidiary of Burlington Northern, Inc., is one of the largest coal owners in the valley, and has leased reserves to Consol, Montco, and others. In its view, the rail line to be built by TRRC will facilitate the development of coal interests.

Cities Service Oil and Gas Corporation has reserves at Otter Creek and leases reserves from Meridian. It supports the appication, believing that TRRC will provide it with essential rail service.

TXO Minerals, Inc. holds substantial rights to Federal and State coal interests in the Tongue River Valley. It supports the application to enhance the marketing of Tongue River Valley coal.

5. Need for Rail Service. The initial decision details the evidence submitted by TRRC and prospective shippers to show a need for rail service to the Tongue River Valley. Potential coal mine operators in the Tongue

River Valley are seeking markets for sales to utilities in the Upper Midwest and Pacific Northwest. However, it appears that utilities will not commit to coal purchases from Tongue River Valley mines without a rail system to the mines. With the reluctance of BN to provide rail service, mine operators have taken the initiative to develop rail service.

Coal reserves in the Tongue River Valley are estimated at 10 billion tons, of which approximately 3.5 billion tons are realistically exploitable. TRRC estimates that it would be able to haul between 40 to 50 million tons per year, or 12 unit trains per day.

Market surveys conducted by TRRC indicate that there will be a future need for coal to generate electricity. Utilities that presently have excess generator capacity will need to supply additional electricity by the early 1990's. Tongue River coal mines would be able to compete to supply the additional coal requirements.

Protestants disputed the market studies and claimed

that there is excess mining capability in the Powder River Basin that will satisfy the needs of additional coal generation. However, the record here shows that excess capacity exits only in the Lower Powder River Basin, which supplies markets in the East and Southeast. The primary market for Tongue River Valley coal would be in the Midwest and Pacific Northwest.

6. Financial Plan and Viability. TRRC projects its initial capitalization for construction and operation at $227 million. Under its financing plan, the general partners will make an equity contribution totalling $52 million. The remaining $175 million would be financed by long-term debt. Securities evidencing the debt are the subject of the directly-related application in Finance Docket No. 30186 (Sub-No. 1), filed under 49 U.S.C. 11301 for authorization to issue notes.

The financing plan provides for issuance of two classes of notes. In the first class, three short-term notes totalling $175 million would be issued for interim financing

during the 3-year period for construction of the rail line. In the second class, three long-term notes totalling $175 million would be issued for permanent long-term debt that would replace the short-term notes.

Interim construction financing would be obtained through a commercial bank loan documented by three loan agreements for which separate promissory notes would be issued. The amounts borrowed for each loan agreement represent the proportionate share of each general partner in the TRRC venture. TP's 42.5 percent is designated as "Loan A." DS's 42.5 percent is designated as "Loan B." Otter Creek's 15 percent is designated as "Loan C." Each partner agreed to advance funds to TRRC to enable it to meet payments on each loan.

The obligations of each general partner would be guaranteed by the parent companies: TP's obligations of $74,375,000 by Washington; DS's obligation of $74,375,000 by DS Corp.; and Otter Creek's obligation of $26,250,000 by DuPont. Each loan would be secured by the partnership

interest of each general partner and a proportionate amount of TRRC's assets.

Assuming that market conditions similar to those in effect when the evidence was submitted prevail when the short-term notes would be issued, interest would be at a floating rate. Financial data submitted by TRRC assumes a 12 percent per annum rate including all commitment and agency fees. Construction of the line is assumed to take 3 years. During this period, interest will be reflected by increasing the principal amount of the outstanding amount of each loan.

The plan provides further that the short-term loans could be converted into term loans that would have a 10-year maximum maturity from the end of the construction period. On the term notes, interest would be paid quarterly.

At the end of the construction period, TRRC plans to refinance the loans in the institutional private placement market. The interim financing loans and short

term notes designated as "Loan A," "Loan B," and "Loan C" would be replaced by long-term notes designated respectively as "Series A," "Series B," and "Series C." Each long-term note would be guaranteed and secured in the same manner as the short-term note it replaced. Each long-term note would be issued under a separate indenture with one trustee acting on behalf of lenders under all indentures.

The long-term notes would be sold as separate obligations without cross-defaults to the other long-term notes. Under market conditions in effect when the evidence was submitted, the interest rate on Series A would be approximately 13.25 percent with a maturity of 30 years, Series B would be about 14.25 percent with a maturity of 15 years, and Series C would be approximately 12.75 percent with a maturity of 30 years. Interest on the long-term notes would be paid semi-annually. TRRC's financial adviser indicates that the intent is to issue the long-term notes to pension funds, insurance companies, or

other institutions.

The initial decision analyzes the evidence and financial data submitted by TRRC to support its application. Under the financial plan, fixed charge obligations would be deferred while the line is under construction and funds supplied under short-term loans. Once operations begin, the plan provides that the short-term obligations would be refinanced under long-term notes. TRRC's obligations to repay its debt would begin when operations commence. Assuming that operations begin in 1987, TRRC projects that it will operate at a net deficit from rail operations for the first 5 years of service. After 1992, it expects to operate the line at a net profit. By 1995, TRRC projects having a 16.6 percent rate of return, based on a capital outlay of $253 million, from 17.5 million tons of traffic.

TRRC's data show that, during its first five years of operation, it would not realize enough revenue to meet fixed charges. However, it proposes to use a technique of

"prepaid freight" to overcome deficit operations. Under that technique, utilities or consignees of freight would advance funds to TRRC to enable it to meet fixed charge obligations and other expenses in the first several years of operations. The advances would then be repaid by future reductions in rates or credits against freight charges. These arrangements would be negotiated as contract rates under 49 U.S.C. 10713. To assure adequate cash flow in the early years of operations, TRRC's general partners may make additional contributions or guarantees.

The initial decision also discusses TRRC's use of a 16.3-mile per ton factor in calculating estimated revenue and inclusion of mitigation costs in the financial plan.

7. Environmental Impact. This proceeding is a major Federal action subject to the reporting requirements of NEPA. An extensive analysis of the environmental impact of the construction and operation was directed by the Commission's Section of Energy and Environment (SEE), and the Final Environmental Impact Statement

(FEIS) was served August 23, 1985.

The FEIS analyzed the potential impact of the proposed rail line, reasonable alternatives to it, and impacts of those potential surface mining operations considered to be related actions, as well as the optional alignments at Miles City and Ashland. Also discussed are three other route options: (1) the Tongue River Alternative Route that would cross Pumpkin Creek and run along the east side of Tongue River and join the proposed route 10 miles north of Ashland; (2) the Moon Creek Alternate Route that would run west from Miles City along the former MILW route, follow the Yellowstone River and Moon Creek, and join the proposed route north of Ashland; and (3) the Colstrip Alternate Route that would run the line west from Ashland to Colstrip where it would join with BN. NPRC favors the Moon Creek alternative to avoid having the line run through LARRS. The Colstrip route would result in a 46.1-mile line.

The FEIS concluded that the route proposed by

TRRC and the Colstrip Alternate were feasible choices. The proposed route had adverse environmental impacts, but the adverse impacts on adjoining landowners would be protected by Montana law and measures in a Mitigation Plan. The FEIS did not select between the optional alignments at Miles City and Ashland. Adverse impacts of each optional alignment were also offset in the Mitigation Plan. The initial decision adopted and incorporated the FEIS and Mitigaton Plan.

The primary opposition to the proposals was by landowners represented by NPRC who were principally concerned about adverse environmental impacts on their ranches. The opposition evidence was analyzed by SEE in preparing the Mitigation Plan, and is also analyzed in the initial decision. The Plan sets forth specific mitigation measures to offset adverse effects on adjoining landowners.

The Plan also recognizes that some mitigation measures would be best negotiated by TRRC and affected

landowners. This is particularly true in mitigating adverse impacts at LARRS. The Plan recognizes that TRRC and LARRS will continue discussion of mitigating conditions that will be made part of the final easement agreement for the right-of-way across the facility. Also, the Ashland alignment was left to be negotiated by TRRC and interested parties.

No appeal is taken to the discussion and conclusions in the FEIS, Mitigation Plan, or to the relevant analysis and conclusions in the initial decision.

8. Section 2(c). As stated above, the only issues remaining on appeal relate to the impact of section 2(c) of the Leasing Act, which reads as follows:

> No company or corporation operating a common-carrier railroad shall be given or hold a permit or lease under the provisions of this chapter for any coal deposits except for its own use for

railroad purposes; and such limitations of use shall be expressed in all permits and leases issued to such companies or corporations; and no such company or corporation shall receive or hold under permit or lease more than ten thousand two hundred and forty acres in the aggregate nor more than one permit or lease for each two hundred miles of its railroad lines served or to be served from such coal deposits exclusive of spurs or switches and exclusive of branch lines built to connect the leased coal with the railroad, and also exclusive of parts of the railroad operated mainly by power produced otherwise than by steam.

> Nothing in this section * * * shall preclude such a railroad of less than two hundred miles in length from securing one permit or lease thereunder but no railroad shall hold a permit or lease for lands in any State in which it does not operate main or branch lines.

The scope of section 2(c) has never been judicially determined. The Antitrust Division of the Department of Justice (DOJ) in a memorandum dated April 25, 1980 offered its interpretation. There, DOJ gave a broad interpretation to the statutory term "company or corporation operating a common carrier railroad," because it believes that railroads should not be permitted to evade the prohibition in section 2(c) by doing indirectly what they cannot do directly. Therefore, DOJ concluded (Executive Summary) that: "Section 2(c) prohibits the issuance of federal coal leases to railroads, subsidiaries of railroad

companies, companies which are controlled by a company which operates a railroad, and joint ventures in which a railroad or railroad affiliate is a partner." In that memorandum, DOJ also proposed a set of standards for applying the section 2(c) prohibition, as interpreted.

Before the 1980 DOJ interpretation, DOI, the agency charged with administering section 2(c), had applied a much less restrictive standard to that section — the "alter ego" test. That test has been traditionally applied to the Commodities Clause, in 49 U.S.C. 10746, which is a more general prohibition against railroads transporting goods that they produce or own. Under it, the prohibition does not apply to an affiliated company unless it is so interrelated with the railroad that it should be considered as an alter ego of the railroad.

DOI abandoned the "alter ego" test after reviewing the DOJ's memorandum. In a memorandum dated December 6, 1982, DOI agreed (at 9, but only for prospective, and not retroactive, application) "that

railroad affiliates are not excluded from the prohibition in section 2(c)." However, it expressly declined to adopt the specific standards proposed, stating that DOJ's "guidelines" are not "the only alternate view of the scope of the prohibition." To our knowledge, the DOI has not, to date, adopted any firm standards to determine the reach of section 2(c).[4]

9. ALJ Resolution of the 2(c) Issues. The ALJ determined that the Commission has responsibility to rule on the possible violation of section 2(c) in this case. The ALJ recognized that, when issuance of a certificate of operating authority depends on the applicability of a statute administered by another agency, the Commission would normally defer to that agency for an interpretation of the statute. Here, however, both DOJ and DOI had

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4. Copies of DOJ's memorandum and DOI's memorandum were attached to NPRC's opening brief filed March 8, 1985.

considered the question when the lease to Thermal was issued and determined that, since TRRC was not a certificated railroad, section 2(c) was not violated. In addition, DOI, while agreeing to implement DOJ's interpretation of section 2(c), has decided not to disturb past leases.[5] The ALJ therefore concluded that the responsibility to rule on possible violations of section 2(c) unavoidably passes to the Commission.

Upon issuance of the certificate, TRRC will be able to obtain land through eminent domain, enter into contracts with utilities for transportation of coal, and issue securities for sale in financial markets. The ALJ consequently found that TRRC would become a common carrier railroad and be subject to section 2(c) as soon as it was issued a certificate.

The initial decision applied DOJ's interpretation of

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5. DOI memorandum, supra.

section 2(c), including its proposed standard that a 30 percent interest in a joint venture creates a rebuttable presumption of control. TP's 42.075 percent interest in TRRC was found to be presumptive control.[6] The combination of TP's presumptive control of TRRC and its affiliation with Thermal was determined to result in an integration of Federal coal lease holdings and rail transportation which would bring this transaction under section 2(c).

The initial decision concluded, however, that no violation of section 2(c) would result because the proposal falls within the exception in section 2(c) allowing a

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6. In addition, the initial decision considered that Washington and DS Coal have a community of interest in Cook Mt, located near the Federal lease issued to Thermal. Thermal, in turn, was found to have controlling interest through ThermWest in Cook Mt. DS Coal and Thermal are also partners in Montco. As a result of these affiliations and controlling interests, the ALJ inferred that Washington (through affiliates) could have more than 80 percent control of TRRC. The ALJ noted that the possible domination of TRRC by Washington is also a concern under section 2(c).

railroad of 200 miles or less to secure one Federal lease. TRRC was found to come within the exception, because only one Federal lease was imputed to it,[7] and its line will be less than 100 miles. Therefore, TRRC's applications for authority (1) under section 10901 to construct and operate the line, subject to the Mitigation Plan, and (2) under 11301 to issue securities to finance the transaction, were approved.

APPEALS

As noted above, TRRC and NPRC have both

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7. The ALJ found that only one Federal coal lease should be imputed to TRRC — the one held by Thermal. The pending lease to Wesco was not imputed because (1) it had not been issued and (2) in any event Wesco is not a controlling partner in TRRC under DOJ standards. Similarly, the Federal lease held by Consol in Big Horn County was not imputed because the DuPont interest in TRRC is not controlling (held by the ALJ decision at 26). There are no Federal leases held by the Cook Mt partnership.

appealed the initial decision. NPRC agrees with the finding in the initial decision that TP's affiliation would result in a combination of Federal coal lease holdings and rail transportation within the purview of section 2(c). However, it argues that TRRC does not come within the 200-mile exception and that the present applications must therefore be denied. TRRC, on the other hand, argues that the Commission need not, and indeed ought not, be concerned with the section 2(c) issues in this proceeding. But TRRC also maintains that, if section 2(c) is considered, there is no violation of its provisions here. We will briefly outline the parties' various supporting arguments.

NPRC opposes the application on the ground that approval would violate section 2(c). In its view, an impermissible integration of rail transportation and Federal coal lease holdings would occur, due to TP's 42.075 percent interest in TRRC together with its interest (through its affiliates, Thermal and Wesco) in Federal coal

leases. It agrues that the 200-mile exception, relied upon by the ALJ, only permits a railroad to build a spur line to a mine operating under a Federal lease for use of the coal for railroad purposes (i.e. to fire steam locomotives).

NPRC asserts that the Commission cannot find that the proposed service is required or permitted by the public convenience and necessity if the operation would violate another Federal statute, because an illegal operation would be contrary to the public interest. Thus, NPRC contends that, before ruling on TRRC's application, the Commission must consider whether TRRC's operation would violate section 2(c).

It argues further that the Commission must make its own determination of the section 2(c) issue because the appropriate "sister agency" (DOI) has not, and will not, do so. NPRC believes that, since DOI has already issued the coal lease to Thermal, DOI would be unable to cancel it should TRRC become a railroad. Thus, according to NPRC, DOI would be unable to enforce section 2(c) to curb

a violation. NPRC relies on New Mexico Navajo Ranchers Ass'n v. I.C.C., 702 F.2d 227 (D.C. Cir. 1983) (New Mexico) for the principle that the Commission must make its own, independent interpretation of another Federal statute if the agency responsible for administering that statute is unwilling or unable to perform that function.

On the other hand, TRRC argues that the Commission does not have any jurisdiction to administer or enforce section 2(c). In TRRC's view, section 2(c) is directed only at the development of the public's mineral resources, and not at the operaton of a common carrier railroad. It views NPRC's arguments as an improper attempt to reverse the application of section 2(c). It argues that, should TRRC itself acquire a Federal lease, DOI would have authority to cancel the lease. As for the lease to Thermal, TRRC maintains that this lease was already reviewed by DOI and DOJ, who found no violation of section 2(c). Their determinations, TRRC argues, are binding on the Commission.

TRRC also argues that the Commission is not obligated to reflect the purpose of section 2(c) in its decision. In its view, the policies of section 2(c) are not related to the Commission's statutory objectives under the Rail Transporation Policy in 49 U.S.C. 10101a or section 10901 and do not have to be considered here. It argues that the New Mexico case is distinguishable, because the issues in that case were relevant to the public interest determination under section 10901, whereas section 2(c) is not. Another factor which sets this case apart from New Mexico, it asserts, is that DOI and DOT are continuing to monitor this proceeding and can act on the section 2(c) issue when TRRC becomes operational.

Finally, TRRC denies that any violation of section 2(c) would occur here. It argues that section 2(c) applies only to operating railroads and that TRRC, which has no operating assets or employees, does not currently fit within the statute. It asserts further that no Federal coal

lease holders are sufficiently related to (and integrated with) TRRC to have their leases imputed to TRRC. (It points cut that Cook Mt does not even hold any Federal lease, but is being developed exclusively on private reserves.) Moreover, even if the Thermal lease were imputed to it, TRRC agrees with the ALJ's conclusion that the 200-mile exception would apply.

DISCUSSION AND CONCLUSIONS

A rail carrier may construct and operate over a railroad line only if the Commission finds that the present or future public convenience and necessity require or permit these activities. 49 U.S.C. 10901(a).

> Undoubtedly, the purpose of these provisions is to enable the Commission, in the interest of the public, to prevent improvident and unnecessary

expenditures for the construction and operation of lines not needed to insure adequate service. In the absence of a plain declaration to that effect, it would be unreasonable to hold that Congress did not intend to empower the Commission to authorize construction of new lines to provide for shippers such competing service as it should find to be convenient or necessary in the public interest. * * * The Commission has recognized the advantages of competitive service to shippers especially in respect of a diversified car supply for the shipment of coal * * * that under some circumstances competition operates to stimulate better service and that reasonable competition may be in the public interest. Ches. & Ohio Ry. v. United

States, 283 U.S. 35, 42-43 (1931).

We adopt the reasoning and conclusions of the initial decision finding that that construction, operation, and financing of the subject line by TRRC meet appropriate public interest standards in 49 U.S.C. 10901 and 11301. The evidence of record shows a need for rail transportation to serve coal mines in the Tongue River Valley. This is a provident and necessary expenditure that will give shippers new rail service to their benefit and to the benefit of the public as well. TRRC has also demonstrated that it is able to construct and operate the line and satisfy the financial obligations to be incurred in the transaction.

The principle opponents to the proposal are landowners who are concerned about the adverse environmental impacts of the construction and operation of the line. These concerns are addressed in the FEIS,

which we are adopting. We also adopt the ALJ's finding to subject the construction and operation to the Mitigation Plan, set forth Appendix B to the initial decision, and we note that no party appealed that plan.

We disagree, however, with the conclusions in the initial decision on the consideration that must be given to section 2(c) in this proceeding.

The parties' arguments on the extent to which we must consider the section 2(c) issue hinge on their differing interpretations of New Mexico. NPRC claims that the New Mexico principle requires that we determine whether the proposal will constitute a violation of section 2(c) and, if so, deny the authority requested. TRRC maintains that New Mexico is not implicated here because the section 2(c) issue is not relevant to our required findings under section 10901. We conclude the neither argument accurately describes our responsibilities in this case, as outlined by the court in New Mexico.

In New Mexico, the court found that the

Commission, in authorizing two railroads to construct and operate a new rail line through land owned by Navajo Indians, failed to give sufficient consideration to issues raised under the American Indian Religious Freedom Act, 42 U.S.C. 1996, and the National Historic Preservation Act, 16 U.S.C. 470f. Those issues related to the validity of adequacy of consents given by the Indians for the use of those lands. Even though DOI was responsible for ruling on the validity of the consents, the court required the Commission to take evidence on the issue and make its own determination because DOI had failed to resolve the matter,[8] and the question was relevant to the Commission's inquiry under section 10901. 702 F.2d at

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8. Upon receipt of the rail authority, the railroad had commenced state action to condemn the Indian's land. However, neither the Commission nor DOI had ruled on the sufficiency of their commitment to protect historic and sacred Indian sites.

233. The court also required the Commission to consider the Federal policy of minimizing the disturbance of the Indian's quiet possession of their land, as reflected in two other Federal statutes, in deciding whether the proposed construction was consistent with the public interest. The court held "that the ICC must address itself to the federal policis embodied in . . . other statutes." Id. at 233 n.7.

The New Mexico decision cannot be limited in the manner TRRC suggests. Given the broad, public interest nature of our inquiry under section 10901, consideration must be given to the policies underlying any Federal statute reasonably brought into issue in such a case. The Federal policy embodied in the section 2(c) — separation of rail coal transportation from ownership of Federal coal leases in order to prevent railroad monopolization of the coal industry, (See DOJ memorandum, Executive Summary) — is clearly relevant to a determination whether an affiliate of Federal coal lease holders should be given rail authority. Therefore, we must consider the section 2(c)

issue. However, as explained below, we are not here required in this situation to rule definitively on whether our action could permit a potential future violation of section 2(c).

We do not read New Mexico as rigidly as NPRC concerning the proper means of accommodating or resolving potentially conflicting statutes administered by other Federal agencies. NPRC believes that we are limited to the two options that were discussed in New Mexico: i.e., either: (1) staying consideration of the rail license until the appropriate agency can resolve the matter in dispute; or (2) ruling on a statute that we do not administer, to be sure that no violation of that statute would occur. In the particular situation presented here neither of these courses is necessary or desirable. This situation is simply not like New Mexico, where another Federal statute and the policy underlying it would be ignored or defeated if the Commission were to issue the rail authority without first resolving the matter.

Any potential violation of section 2(c) that might occur here would not be immediate. Section 2(c) applies by its clear language only to operating railroads. Once certified, TRRC will not be able to comence operations for at least three years, since it must first build the line. Also, Thermal, does not expect to develop its Federal leasehold for several years after TRRC begins operation. Wesco has no plans as yet to develop its lease. These leases could also be voided as a result of pending court actions against DOI.[9] Thus, any ruling by us on this matter would be premature at this time.

Given the time available, the section 2(c) issue can

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9. These leases were cancelled and voided in Northern Cheyenne Tribe v. Hodel, supra, order of June 4, 1985. The Federal judge has stayed his order voiding the lease pending disposition of a motion to alter or amend his judgment, but all operations on the lands are enjoined in the meantime. Id., order of Oct. 7, 1985.

and should be fully addressed and resolved or remedied by the appropriate Federal agency in a timely manner. The ALJ was simply mistaken in his assumption that such a ruling could not be obtained. DOI has procedures for cancellation of leases which provide that failure to comply with the provisions of the Leasing Act [including section 2(c)] constitutes grounds for cancellation. 43 C.F.R. 3452.2-1(a). Moreover, DOJ may seek cancellation through a court enforcement action. 30 U.S.C. 184(h)(1). These prescribed remedies are still available should the leases issued to Thermal and Wesco be found to be in violation of section 2(c). Indeed, DOJ and DOI are both aware of TRRC's situation and will consult as necessary.[10] (Letter of September 26, 1983 from Assistant Attorney General William F. Baxter to Senator Baucus.)

Contrary to the impression of the ALJ, DOI has not

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10. We note that the DOJ and DOI are both on the service list in this proceeding.

made a final ruling on this matter. It simply determined that issuing a lease to Thermal did not violate section 2(c), because TRRC was not a certificated railroad. This certificate and decision will change that. As a result, DOI could rule on the changed circumstances created by TRRC's new status.

Because DOI can ultimately decide the section 2(c) question, a matter within its primary jurisdiction, we should not attempt to decide whether at some point in the future a violation could result. Declining to interfere with the jurisdiction and expertise of a sister agency is consistent with well established case law, see e.g., Consolidated Rail Corp. v. ICC, 646 F.2d 642, 650 (D.C. Cir.), cert. denied, 454 U.S. 1047 (1981); Delta Air Lines v. CAB, 543 F.2d 247, 260 (D.C. Cir. 1976); Air Line Pilots Ass'n v. CAB, 516 F.2d 1269, 1276 (2d Cir. 1975), and is especially appropriate here for several reasons.

Because the DOJ guidelines were not adopted by

DOI, we do not know what criteria DOI would use in applying section 2(c) to rail affiliates. With no clear guidelines to apply, our ruling could be contrary to what DOI might conclude.[11] Moreover, our determination would not be binding on DOI and DOJ.

Although we defer to DOI for a determination whether section 2(c) may ultimately be violated, we need not stay consideration of the rail certificate pending a determination by DOI. The situation here is unlike New Mexico, where the grant of authority created a situation that put Indian Lands in immediate jeopardy. In New

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11. For example, in determining control, DOJ has suggested a percentage of ownership presumption. That is not the way we approach issues of control under 49 U.S.C. 11343. See Maine Central R. Co. v. Amoskeag Co., 360 I.C.C. 147, 151 (1979). Rather, we focus on the ability to control, which is reflected in the power to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. Colletti - Control - Comet Freight Lines, 38 M.C.C. 95, 97 (1942).

Mexico, construction would have irreparably harmed historical and sacred Indian lands. Here, no rights will be violated by commencing construction. There is sufficient time for the appropriate authorities to determine whether a violation of section 2(c) would occur and, if so, order the lease cancelled or transferred prior to commencement of operations.

Moreover, a grant of rail authority pending subsequent determination by other agencies is consistent with past agency action. For example, in Cross-Sound Ferry Service, Inc. v. United States, 573 F.2d 725 (2d Cir. 1978), the Commission had granted a conditional certificate before the applicant had received all necessary safety and operating licenses from a variety of federal, state, and local government agencies. In upholding the Commission's action, the court found (at 733):

> The existence of the safety and accessibility problems in the proposed

sites, and the necessity of satisfying other regulatory bodies in these regards have been recognized and weighed by the Commission in its grant of the license and the time limitation it has imposed on the license. The certificate of public convenience and necessity is intended to be a necessary, but not a sufficient condition of operation. As such, it contemplates the simultaneous operation of other controls which are not primarily concerned with commercial utility.

See also, Concord Township, Delaware County v. United States, 625 F.2d 1068, 1074 (3d Cir. 1980) (obtaining a Commission certificate to operate a rail line "does not authorize construction in the flood plain . . . permits must [also] be obtained from other federal, state, and local agencies").

The evidence of record warrants issuance of the certificate of public convenience and necessity to TRRC to meet the demonstrated public need of shippers for rail service. We note that the immediate need is for service to mines located on private reserves. TRRC may commence construction of the line once this decision becomes effective, and it has compiled with the environmental conditions imposed in the initial decision which we adopt. However, since we are required to consider the policies of section 2(c) under New Mexico in ruling on TRRC's operation, we will impose a condition on the start of operations.

TRRC's start of operations is conditioned on submission of evidence sufficient to support a finding by the Commission that operation will not result in a violation of section 2(c). The condition may be satisfied by submission of a statement from DOI that there will not be a violation of section 2(c) when TRRC starts operations.

We emphasize that, although we have considered the policies of section 2(c), and therefore fashioned this condition, we do not intend to rule on whether TRRC's or its affiliates' activities violate section 2(c) because Congress has entrusted that function and responsibility to other Federal agencies, and we will not intrude into their jursidiction. Therefore, it will be TRRC's responsibility to assure that any questions arising under section 2(c) have been resolved before it can begin operating. We do not view this as a hardship on the TRRC, since it has indicated that it will take three years to complete construction of the line, and we expect it to be able to resolve any questions within that time.

FINDINGS

In Finance Docket No. 30186, we find that the present and future public convenience and necessity require or permit the construction and operation of a line of railroad described above (including either of the

alignments at Miles City and Ashland), subject to (1) mitigating conditions in Appendix B of the initial decision, and (2) the section 2(c) condition precedent to operation discussed above.

In Finance Docket No. 30186 (Sub-No. 1), to the extent we have jurisdiction, we find that the securities proposed to be issued: (a) are for a lawful object within the corporate purpose of TRRC and reasonably appropriate for that purpose; (b) are compatible with the public interest; (c) are appropriate for or consistent with the proper performance by TRRC of service to the public as a common carrier; and (d) will not impair the financial ability of TRRC to provide that service.

It is certified:

The present and future public convenience and necessity require or permit construction and operation by Tongue River Railroad Company of approximately 89 miles of rail line from two points near Ashland, MT to a point near Miles City, MT, subject to (1) mitigating conditions in

Appendix B of the initial decision, and (2) the section 2(c) condition precedent to operation discussed above.

It is ordered:

1. The appeals of the TRRC and NPRC are denied.

2. The initial decision, as modified here and subject to the environmental mitigation plan and section 2(c) conditions, is affirmed.

3. This decision will be effective 30 days after the date served.

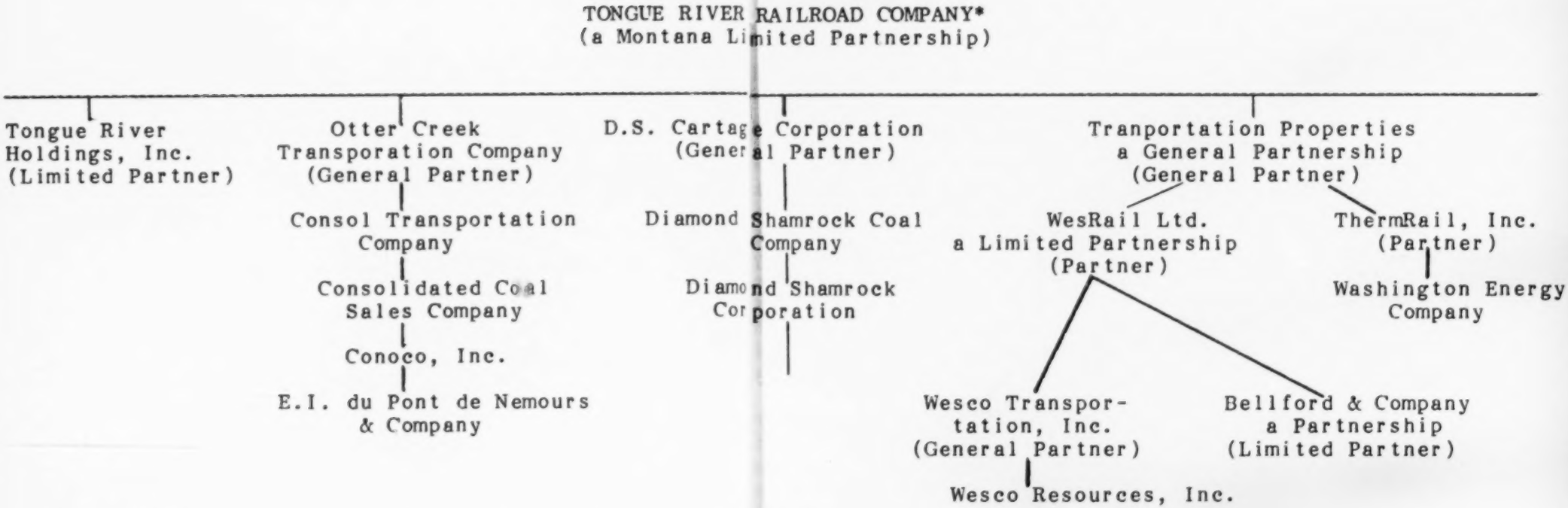
By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre and Lamboley.

(seal)

James H. Bayne

Secretary

CHART I - TRRC OWNERSHIP


TONGUE RIVER RAILROAD COMPANY*
(a Montana Limited Partnership)
Tongue River Holdings, Inc. (Limited Partner)
Otter Creek Transporation Company (General Partner)
Consol Transportation Company
Consolidated Coal Sales Company
Conoco, Inc.
E.I. du Pont de Nemours & Company
D.S. Cartage Corporation (General Partner)
Diamond Shamrock Coal Company
Diamond Shamrock Corporation
Tranportation Properties a General Partnership (General Partner)
WesRail Ltd. a Limited Partnership (Partner)
ThermRail, Inc. (Partner)
Washington Energy Company
Wesco Transportation, Inc. (General Partner)
Bellford & Company a Partnership (Limited Partner)
Wesco Resources, Inc.

* All companies are corporations unless otherwise indicated

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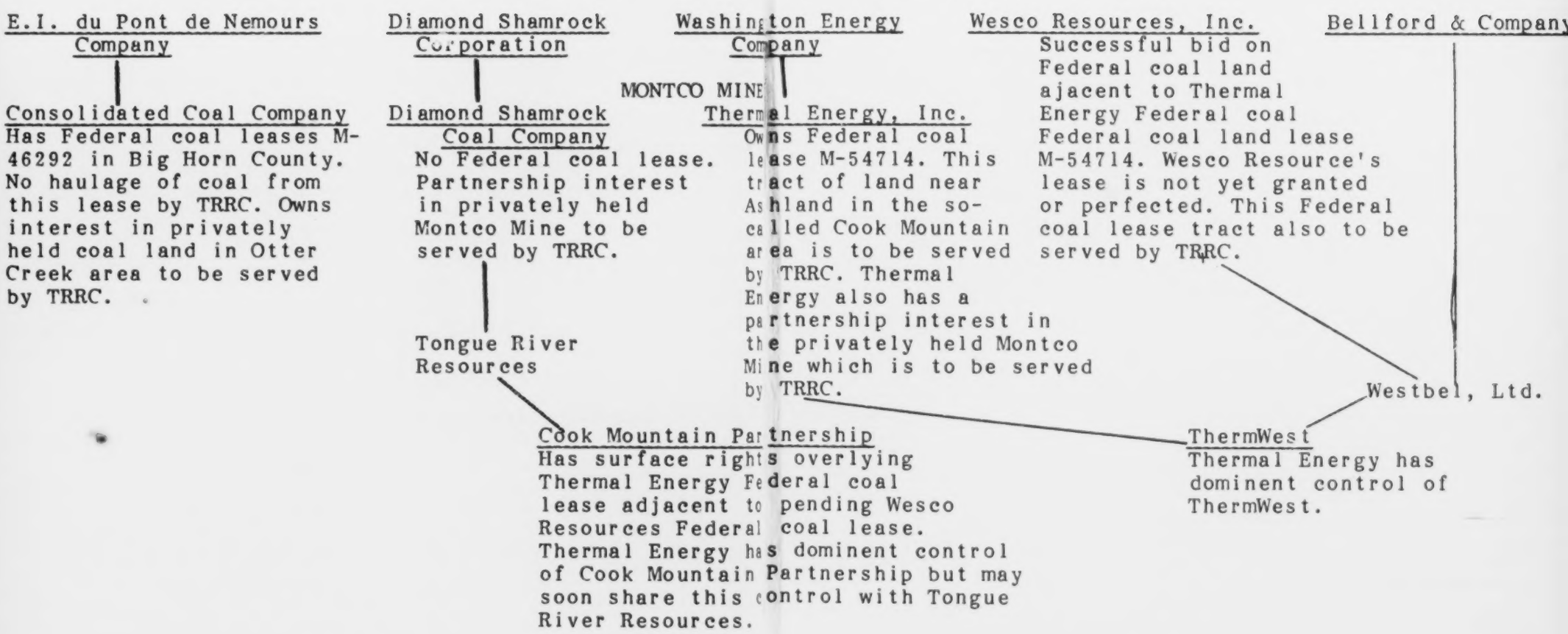
CHART II - COAL OWNERSHIP


E.I. du Pont de Nemours Company
Consolidated Coal Company
Has Federal coal leases M-46292 in Big Horn County. No haulage of coal from this lease by TRRC. Owns interest in privately held coal land in Otter Creek area to be served by TRRC.
Diamond Shamrock Corporation
Diamond Shamrock Coal Company
No Federal coal lease. Partnership interest in privately held Montco Mine to be served by TRRC.
Tongue River Resources
Washington Energy Company
MONTCO MINE
Thermal Energy, Inc.
Owns Federal coal lease M-54714. This tract of land near Ashland in the so-called Cook Mountain area is to be served by TRRC. Thermal Energy also has a partnership interest in the privately held Montco Mine which is to be served by TRRC.
Wesco Resources, Inc.
Successful bid on Federal coal land ajacent to Thermal Energy Federal coal Federal coal land lease M-54714. Wesco Resource's lease is not yet granted or perfected. This Federal coal lease tract also to be served by TRRC.
Bellford & Company
Westbel, Ltd.
Cook Mountain Partnership
Has surface rights overlying Thermal Energy Federal coal lease adjacent to pending Wesco Resources Federal coal lease. Thermal Energy has dominent control of Cook Mountain Partnership but may soon share this control with Tongue River Resources.
ThermWest
Thermal Energy has dominent control of ThermWest.

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